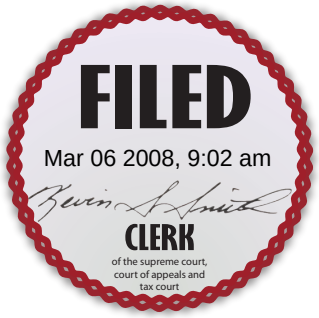

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IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE INVOLUNTARY TERMINATION OF THE PARENT-CHILD RELATIONSHIP OF B.S., A MINOR CHILD, AND HER MOTER, DAWN LEWIS AND HER FATHER, JOE SMART,	)	
DAWN LEWIS and JOE SMART, Appellants/Respondents,	)	
vs.	)	No. 49A02-0708-JV-719
MARION COUNTY DEPARTMENT OF CHILD SERVICES Appellee/Petitioner,	)	
and	)	
CHILD ADVOCATES, INC. Appellee/Guardian ad Litem.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Danielle Gaughan, Magistrate
The Honorable Marilyn A. Moores, Judge
Cause No. 49D09-0508-JT-32845

March 6, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BRADFORD, Judge

Appellants-Respondents Dawn Lewis and Joe Smart (collectively "parents") appeal from the juvenile court's order terminating their parental rights to B.S. Parents allege that (1) the Marion County Department of Child Services ("MCDCS") did not provide sufficient evidence to support the termination of their parental rights, and (2) termination of their parental rights violates the Fourteenth Amendment of the United States Constitution and contravenes the purpose of Title 31 of the Indiana Code. Concluding that the evidence was sufficient, that termination does not violate the parents' constitutional rights, and that termination was in accordance with the purpose of Title 31, we affirm.

FACTS AND PROCEDURAL HISTORY

B.S. was born on September 13, 2001. Dawn Lewis is B.S.'s mother, and Joe Smart is B.S.'s father. MCDCS became involved with B.S. in December of 2003, after receiving an allegation of neglect. In May 2004, MCDCS removed B.S. from her parents' home for a twenty-four-hour period after receiving another allegation of neglect. Following B.S.'s return to her parents' care, MCDCS offered services to parents, which they accepted, and referral services were initiated shortly after parents signed a Service Referral Agreement.

In November of 2004, MCDCS again received an allegation of neglect involving B.S. MCDCS investigated and found that, although the conditions in the home had generally improved from May of 2004, the gas had been cut off due to an outstanding $1400 bill, Smart was not working and complained that he was responsible for most of B.S.'s care, and Lewis appeared withdrawn. On November 12, 2004, MCDCS filed a petition alleging that B.S. was a Child in Need of Services ("CHINS"), and B.S. was removed from her parents' home. The CHINS Petition alleged that:

> Dawn Lewis and Joe Smart were not providing the child with appropriate care, that Dawn Lewis was then undergoing mental health treatment for depression, post-traumatic stress syndrome and psychotic episodes and that Dawn Lewis was unresponsive to the needs of the child and was unable to provide care for her.

Appellant's App. p. 21. The petition further alleged that the family was offered a Service Referral Agreement but had not been fully compliant with services offered, the family home was dirty and cluttered, and parents did not have the financial resources for the child's necessities such as heat for the home. Parents admitted to the allegations set forth in the CHINS petition, and the juvenile court ordered the parents to participate in services to address their ability to appropriately care for B.S. Parents were granted weekly supervised visitation with B.S. In the year after the CHINS action was filed, parents were non-compliant with services, and on November 17, 2005, their visitation with B.S. was suspended until they became engaged in services.

Parents' visitation rights were reinstated in August 2006. During their supervised visits, numerous supervisors noted that generally, "Smart engages appropriately with [B.S.], talking to her and playing with her," but noted that Lewis "has difficulty engaging

with [B.S.] and usually requires the direction of Joe Smart to be more involved with [B.S.]." Appellant's App. p. 23. Since the reinstatement of visitation, parents have missed numerous scheduled supervised visits with B.S., usually alleging transportation problems.

On August 22, 2005, MCDCS filed a petition to involuntarily terminate parents' parental rights. On April 23, 2007, April 24, 2007, May 10, 2007, May 14, 2007, May 22, 2007, June 11, 2007, June 12, 2007, and June 18, 2007, the juvenile court held a termination hearing at which both parents appeared and were represented by counsel. On July 27, 2007, the juvenile court issued an order terminating parents' parental rights. This appeal follows.

DISCUSSION AND DECISION

The Fourteenth Amendment to the United States Constitution protects the traditional right of parents to establish a home and raise their children. *Bester v. Lake County Office of Family & Children*, 839 N.E.2d 143, 145 (Ind. 2005). Further, we acknowledge that the parent-child relationship is "one of the most valued relationships of our culture." *Id*. However, although parental rights are of a constitutional dimension, the law allows for the termination of those rights when the parents are unable or unwilling to meet their responsibility as parents. *In re T.F.*, 743 N.E.2d 766, 773 (Ind. Ct. App. 2001), *trans. denied*. Therefore, parental rights are not absolute and must be subordinated to the child's interest in determining the appropriate disposition of a petition to terminate the parent-child relationship. *Id*.

The purpose of terminating parental rights is not to punish parents but to protect their child. *Id.* Termination of parental rights is proper where the child's emotional and physical development is threatened. *Id.* The juvenile court need not wait until the child is irreversibly harmed such that her physical, mental, and social development is permanently impaired before terminating the parent-child relationship. *Id.*

I. Sufficiency of the Evidence

Parents contend that the evidence presented at trial was insufficient to support the juvenile court's order terminating their parental rights. In reviewing termination proceedings on appeal, this court will not reweigh the evidence or assess the credibility of the witnesses. *In re Involuntary Termination of Parental Rights of S.P.H.*, 806 N.E.2d 874, 879 (Ind. Ct. App. 2004). We only consider the evidence that supports the juvenile court's decision and reasonable inferences drawn therefrom. *Id.* Where, as here, the juvenile court includes findings of fact and conclusions thereon in its order terminating parental rights, our standard of review is two-tiered. *Id.* First, we must determine whether the evidence supports the findings, and, second, whether the findings support the legal conclusions. *Id.*

In deference to the juvenile court's unique position to assess the evidence, we set aside the juvenile court's findings and judgment terminating a parent-child relationship only if they are clearly erroneous. *Id.* A finding of fact is clearly erroneous when there are no facts or inferences drawn therefrom to support it. *Id.* A judgment is clearly erroneous only if the legal conclusions made by the juvenile court are not supported by its findings of fact, or the conclusions do not support the judgment. *Id.*

In order to involuntarily terminate the parents' parental rights, MCDCS must establish by clear and convincing evidence that:

> (A) one (1) of the following exists:
>
> (i) the child has been removed from the parent for at least six (6) months under a dispositional decree;
>
> (ii) a court has entered a finding under IC 31-34-21-5.6 that reasonable efforts for family preservation or reunification are not required, including a description of the court's finding, the date of the finding, and the manner in which the finding was made; or
>
> (iii) after July 1, 1999, the child has been removed from the parent and has been under the supervision of a county office of family and children for at least fifteen (15) months of the most recent twenty-two (22);
>
> (B) there is a reasonable probability that:
>
> (i) the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied; or
>
> (ii) the continuation of the parent-child relationship poses a threat to the well-being of the child;
>
> (C) termination is in the best interest of the child; and
>
> (D) there is a satisfactory plan for the care and treatment of the child.

Ind. Code § 31-35-2-4(b) (2005). Specifically, parents claim that MCDCS failed to establish that B.S. had been removed from their care for the statutorily-mandated time period prior to the termination of their parental rights, the conditions that resulted in B.S.'s removal from or the continued placement outside their care would not be remedied, that the continuation of the parent-child relationship posed a threat to B.S.'s well-being, and that termination was in B.S.'s best interests.

A. Removal from Care

Parents first claim that the juvenile court erred by terminating their parental rights because MCDCS failed to prove that B.S. had been removed from their care for the statutorily-mandated period of time. Specifically, they claim that Indiana Code section

31-35-2-4(b)(2)(A) required MCDCS to establish that B.S. had been removed from their care for at least fifteen of the most recent twenty-two months because the petition to terminate their rights was filed after July 1, 1999. We disagree. In *In re B.J.*, 879 N.E.2d 7 (Ind. Ct. App. 2008), *trans. pending*, a panel of this court recently rejected this argument, holding that "[c]learly, subsection (b)(2)(A) is written in the disjunctive." *Id*. at 20. Thus, MCDCS was "required to allege and prove only one of the enumerated elements in subsection (A), which it did." *Id*. To read Indiana Code section 31-35-2-4(b)(2)(A)(iii) the way parents contend would eviscerate the statute, rendering meaningless subsections 4(b)(2)(A)(i) and (ii). *Id*. at 21. In accordance with *In re B.J.*, we conclude that MCDCS could satisfy subsection (b)(2)(A) by proving any one of the enumerated elements delineated in subsection (b)(2)(A). Because MCDCS presented clear and convincing evidence proving that B.S. had been removed from her parents' care for at least six months pursuant to a dispositional decree, we conclude that the evidence was sufficient to support the juvenile court's order terminating parents' parental rights.

B. Conditions Resulting in Removal Not Likely to be Remedied

We next consider parents' claim that MCDCS failed to establish that the conditions resulting in B.S.'s removal from their home will not be remedied and that the continuation of the parent-child relationship poses a threat to B.S. Although parents claim that MCDCS failed to establish both of the elements outlined in Indiana Code section 31-35-2-4(b)(2)(B), we note that because Indiana Code section 31-35-2-4(b)(2)(B) is written in the disjunctive, the juvenile court need only find either that the conditions resulting in removal will not be remedied or that the continuation of the

parent-child relationship poses a threat to the child. *In re C.C.*, 788 N.E.2d 847, 854 (Ind. Ct. App. 2003), *trans. denied*. Therefore, "where, as here, the trial court specifically finds that there is a reasonable probability that the conditions which resulted in the removal of the child would not be remedied, and there is sufficient evidence in the record supporting the trial court's conclusion, it is not necessary for [MCDCS] to prove or for the trial court to find that the continuation of the parent-child relationship poses a threat to the child." *In re S.P.H.*, 806 N.E.2d at 882. In order to determine that the conditions will not be remedied, the juvenile court should first determine what conditions led MCDCS to place B.S. outside her parents' home, and, second, whether there is a reasonable probability that those conditions will be remedied. *Id*.

When assessing whether a reasonable probability exists that the conditions justifying a child's removal and continued placement outside the home will not be remedied, the juvenile court must judge the parents' fitness to care for their child at the time of the termination hearing, taking into consideration evidence of changed conditions. *In re A.N.J.*, 690 N.E.2d 716, 721 (Ind. Ct. App. 1997). The juvenile court must also evaluate the parents' habitual pattern of conduct to determine whether there is a substantial probability of future neglect or deprivation. *Id*. A juvenile court may properly consider evidence of the parents' prior criminal history, drug and alcohol abuse, history of neglect, failure to provide support, and lack of adequate employment and housing. *McBride v. Monroe County Office of Family & Children*, 798 N.E.2d 185, 199 (Ind. Ct. App. 2003). Moreover, a juvenile court "'can reasonably consider the services

offered by [MCDCS] to the parent and the parent's response to those services.'" *Id*. (quoting *In re A.C.C.*, 682 N.E.2d 542, 544 (Ind. Ct. App. 1997)).

Here, the juvenile court found that B.S. was removed from her parents' care because they were not providing her with the appropriate care, Lewis was unresponsive to her needs, Lewis was unable to provide appropriate care, parents had not been fully compliant with services previously offered, the family home was dirty and cluttered, and parents did not have the financial resources to pay for B.S.'s necessities, such as heat for the home. In support of its determination that these conditions would not likely be remedied, the juvenile court found that:

> 19. Dawn Lewis and Joe Smart have shown an ability to take care of themselves, but not the ability to take care of a child, especially a child with [B.S.'s] special needs. As long as this case has gone on, home based counseling has not progressed to the point where visits are unsupervised or even in the home.
> 20. When [B.S.] was removed from Dawn Lewis and Joe Smart's home, the Court ordered that Joe Smart obtain stable employment so that there would be enough income to support a child. Dawn Lewis and Joe Smart were living off of Dawn Lewis's SSD income but additional income was required to meet the expenses of the household. Joe Smart has failed to obtain full-time stable employment and has only been working on and off throughout the case.
> 21. Dawn Lewis is not able to maintain full-time employment due to her mental illness but she was ordered by the Court to enroll for food stamps. Dawn Lewis did not attend her renewal appointment so she lost her food stamps.
> ….
> 25. When [B.S.] was removed from the home of Dawn Lewis and Joe Smart, both parents suffered from mental illnesses and were unable to effectively parent [B.S.] Dawn Lewis has significant mental health issues and cannot care for [B.S.] alone. Dawn Lewis cannot parent [B.S.] without supervision and direction. Dawn Lewis would require Joe [Smart's] assistance and constant presence in caring for [B.S.] Joe [Smart] has not dealt with his mental health issues and is unable to care for Dawn Lewis

> with her mental health issues, [B.S.] with her special needs, as well as seek treatment for his own mental health issues.

Appellant's App. p. 23-24. The juvenile court further found that in the year following the CHINS determination, the parents were non-compliant with the court-ordered services, but have since completed many, but not all of the services. Most notably, the juvenile court found that Smart has failed to obtain stable full-time employment. Further, at trial, the testimony established that Smart was "somewhat uncooperative" with service providers. Appellant's App. p. 23. Additionally, parents have failed to obtain suitable housing. "A pattern of unwillingness to deal with parenting problems and to cooperate with those providing services, in conjunction with unchanged conditions, support a finding that there exists no reasonable probability that the conditions will change." *In re L.S.*, 717 N.E.2d 204, 210 (Ind. Ct. App. 1999), *trans. denied*.

When considered as a whole, the evidence is sufficient to demonstrate a reasonable probability that the conditions which resulted in B.S.'s removal from her parents' home would not be remedied. Although parents argued and the juvenile court recognized that they had completed most of the court-ordered services by the time of the termination hearings, it was within the province of the juvenile court, as the finder of fact, to minimize this evidence in light of its determination that the parents' financial and mental health conditions which led to B.S.'s removal were unlikely to change. *See id*. Parents are effectively asking this court to reweigh the evidence on appeal, which, again, we will not do. *See In re S.P.H.*, 806 N.E.2d at 879. Under these circumstances, we cannot say that the juvenile court erred in determining that MCDCS had established that

it is unlikely that the conditions resulting in B.S.'s removal would not be remedied. *See In re C.M.*, 675 N.E.2d 1134, 1140 (Ind. Ct. App. 1997). We therefore conclude that the evidence was sufficient to support the juvenile court's determination that the conditions that resulted in B.S.'s removal from her parents' care are unlikely to be remedied. Having concluded that the evidence was sufficient to support the juvenile court's determination and finding no error by the juvenile court, we need not consider whether the continuation of the parent-child relationship poses a threat to B.S.'s well being because MCDCS has satisfied the requirements of Indiana Code section 31-35-2-4(b)(2)(B) by clear and convincing evidence.

C. B.S.'s Best Interests

Next, we address parents' claim that MCDCS failed to prove by clear and convincing evidence that termination of their parental rights was in B.S.'s best interests. We are mindful that in determining what is in the best interests of the child, the juvenile court is required to look beyond the factors identified by MCDCS and look to the totality of the evidence. *McBride v. Monroe County Office of Family & Children*, 798 N.E.2d 185, 203 (Ind. Ct. App. 2003). In doing so, the juvenile court must subordinate the interests of the parents to those of the child involved. *Id*.

On appeal, parents correctly assert that their parental rights should not be terminated solely because there is a better home available for B.S. *In re K.S.*, 750 N.E.2d 832, 837 (Ind. Ct. App. 2001). Our review of the evidence, however, does not reveal that the juvenile court's termination of parents' parental rights was based on who could provide a "better" home for B.S., but instead was properly based on the inadequacy of

parents' custody. *In re V.A.*, 632 N.E.2d 752, 756 (Ind. Ct. App. 1994) (stating that it is the inadequacy of parental custody and not the superiority of an available alternative that determines whether parental rights should be terminated). Furthermore, this court has previously determined that the guardian ad litem's testimony regarding the child's need for permanency supports a finding that termination is in the child's best interests. *McBride*, 798 N.E.2d at 203.

Here, the testimony establishes that B.S. has a need for permanency and that the termination of parents' parental rights would serve B.S.'s best interests. The guardian ad litem, Nicole Watkins-Powell, testified to B.S.'s need for permanency and stated that she believed that reunification would be detrimental to B.S.'s best interests. She further testified that granting parents more time to complete services prior to termination would be detrimental to B.S.'s best interests because "the length of time that has already passed is a, is a significant chunk out of this small child's life." Tr. p. 1247. Likewise, MCDCS case manager Wendy Taylor testified to B.S.'s need for permanency, stating that there was currently no indication that parents would be ready and able to provide the care that B.S. requires at any time in the near future, and, as such, termination would be in B.S.'s best interests. Additionally, Dr. Mary Papandria, a clinical psychologist who prepared a psychological evaluation of B.S., opined that termination of parents' parental rights was in B.S.'s best interests, testifying that:

> [T]he thing that is most startling to me right now is the fact that this child has been out of their, Mr. Smart and Mrs. Lewis's care for over two years, whether a child is, is five years old or ten years old or fifteen years old and whether they have psychological or behavioral issues I just think that that's really going to be incredibly disruptive for any child. You know if they're

> in a stable environment, a consistent environment, they're getting the majority of their needs met. To then be taken from that environment and placed into another one. Whether it's another foster care setting, another pre-adoptive setting, [or reunification with the parents] … I just think that you know it, it's so disruptive to a human being to be constantly to be placed in one after the other, after the other environment. What I saw with [B.S.] is she appears to be doing very well. She appears to be thriving in this structured, nurturing environment … and to see her removed again, to a [home exhibiting] questionable stability … I just think that's incredibly detrimental, would be incredibly detrimental.

Tr. p. 745-46. Furthermore, home-based counselor Amy Green testified that it would not currently be in B.S.'s best interests to be placed in her parents' home. The juvenile court did not have to wait until B.S. was irreversibly harmed such that her physical, mental, and social development was permanently impaired before terminating parents' parental rights. *See In re C.M.*, 675 N.E.2d at 1140. In light of the testimony of the MCDCS case manager, the guardian ad litem, Dr. Papandria, and the home-based counselor, we conclude that the evidence is sufficient to satisfy MCDCS's burden of proving that termination of parents' parental rights is in B.S.'s best interests.

II. Fourteenth Amendment and Title 31

Additionally, parents contend that the termination of their parental rights violated their constitutional rights and contravened the stated purpose of Title 31 of the Indiana Code. We, however, are unpersuaded by this contention. While we recognize that one's interest in the care, custody, and control of his or her child is "perhaps one of the oldest fundamental liberty interests," we also recognize that parental rights are not absolute and may be terminated when parents are unable or unwilling to meet their parental responsibilities. *Bester*, 839 N.E.2d at 147. The Indiana General Assembly has also

recognized the importance of the parent-child relationship, and has accordingly codified specific statutory requirements which must be established by clear and convincing evidence prior to the termination of one's parental rights. *See* Ind. Code § 31-35-2-4(b). Here, having already concluded that MCDCS successfully established each of the required statutory factors, we cannot say that parents' constitutionally protected rights were violated by the termination of their parental rights. In light of our conclusion that MCDCS successfully established the statutory requirements for termination of parents' parental rights pursuant to Indiana Code section 31-35-2-4(b), we reject parents' argument that the termination of their parental rights contravenes the stated purpose of Title 31 of the Indiana Code, and instead conclude that the termination of these parents' parental rights conforms with the stated statutory purpose of "remov[ing] children from families only when it is in the child's best interest or in the best interest of public safety" and "provid[ing] for adoption as a viable permanency plan for children who are adjudicated children in need of services." Ind. Code § 31-10-2-1(6) & (7) (1998).

In sum, we conclude that the juvenile court did not err in terminating parents' parental rights, the evidence provided at trial was sufficient to support the juvenile court's termination order, and termination of parents' parental rights did not violate their constitutional rights or contravene the purpose of Title 31 of the Indiana Code.

The judgment of the juvenile court is affirmed.

BAKER, C.J., and DARDEN, J., concur.